



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 9, 1995

Mr. David M. Berman
Nichols, Jackson, Dillard, Hager & Smith
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR95-112

Dear Mr. Berman:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30116.

The City of Lake Dallas (the "city") received a request for records concerning an internal investigation. You state that the information requested is confidential pursuant to section 552.101 because it pertains to complaints of sexual harassment. You also contend that the records at issue are excepted from disclosure pursuant to sections 552.103, 552.107, 552.108, and 552.111. The records were submitted to this office for review.¹ We will consider your arguments.

Information is excepted from disclosure by a common-law right of privacy under section 552.101 if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) *cert denied*, 430 U.S. 930 (1977). In *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the

¹One of the records submitted to this office appears to be non-responsive to the open records request. We marked this document as non-responsive and did not review it.

misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released."² *Id.*

The *Ellen* decision controls the release of the documents you have submitted for our review. We believe there is a legitimate public interest in the substance of the complaint regarding the allegations of sexual harassment. However, the identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*. We have marked the types of information that must be withheld to protect the identities of the complainant and witnesses. In accordance with the holding in *Ellen*, we have marked certain information in the records as confidential.

As to the remaining information, it is not excepted from disclosure pursuant to sections 552.103(a), 552.107, 552.108 or 552.111.³ To show the applicability of section 552.103, the city had the burden of providing relevant facts and documents to show that litigation is pending or reasonably anticipated and that the records at issue are related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city made no such showing.

²Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of this information greatly outweighs any privacy interest the accused may have. See *Ellen*, 840 S.W.2d at 525.

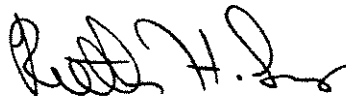
³We note additionally that the city provided this office no evidence that it timely sought a decision from this office. Section 552.301 requires a governmental body to release the requested information or to request a decision from the attorney general within ten days of receiving the request if it is information the governmental body wishes to withhold. If the governmental body fails to request a decision within ten days of receiving the open records request, the information at issue is presumed public. The governmental body must show a compelling interest to overcome this presumption, such as common-law privacy under section 552.101. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision Nos. 319 (1982); 150 (1977); 26 (1974).

Section 552.108 excepts from disclosure "[a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" You provided no information indicating how these particular investigation records are related to the investigation, detection, or prosecution of any criminal activity. Section 552.107 provides an exception from disclosure for records that fall within the attorney-client privilege. That privilege includes communications from a client to an attorney or from an attorney to a client. Open Records Decision No. 556 (1990). None of the records submitted to this office are from or to an attorney.

Section 552.111 excepts from disclosure interagency or intra-agency communications "consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5. We note that this office previously held that section 552.111 was applicable to the advice, opinion and recommendations used in decision-making processes within an governmental entity. Open Records Decision Nos. 574 (1990) at 1-2; 565 (1990) at 9. However, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court addressed the proper scope and interpretation of this section. In light of that decision, this office reexamined its past rulings. In Open Records Decision No. 615, we determined that in order to be excepted from disclosure, the advice, opinion, and recommendation must be related to policymaking functions of the governmental body rather than to decision-making concerning routine personnel and administrative matters. The small portion of the records at issue containing advice, opinion, and recommendation is related to the internal investigation of a routine personnel or administrative matter rather than the city's policymaking functions.

You must withhold from disclosure the marked portions of the records submitted to this office. The other portions of the records must be released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/LRD/rho

Ref.: ID# 30116

Enclosures: Marked documents

cc: Ms. Jody Brooks
P.O. Box 293852
Lewisville, Texas 75029-3852
(w/o enclosures)